

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

| | | |
|---------------------|---|----------------|
| LISA HARRIS FISHER | : | CIVIL ACTION |
| and CHARLES FISHER, | : | |
| Plaintiffs, | : | |
| | : | |
| v. | : | |
| | : | |
| ACCOR HOTELS, INC., | : | |
| Defendant. | : | No. 02-CV-8576 |

MEMORANDUM AND ORDER

J. M. KELLY, J.

FEBRUARY , 2004

Presently before the Court is a styled Motion in Limine to Preclude Defendant from Calling Witnesses or Offering Evidence as to Plaintiff's Representations on an Application for DPW Benefits filed by Plaintiffs Lisa Harris Fisher and Charles Fisher (collectively, "Plaintiffs") and the Response thereto filed by Defendant Accor North America, Inc. ("Defendant"). Plaintiffs move in limine to exclude evidence of Plaintiff Lisa Harris Fisher's statements in an application for benefits from the Commonwealth of Pennsylvania Department of Public Welfare ("DPW") as improper impeachment evidence under Federal Rule of Evidence 609, which governs impeachment by evidence of criminal conviction, while Defendant argues that such evidence is permissible under Federal Rule of Evidence 608(b), which sets forth the parameters for inquiry into specific instances of conduct when demonstrating a witness' credibility for truthfulness. For the following reasons, Plaintiffs' Motion in Limine is **GRANTED IN PART** and **DENIED IN PART**.

I. BACKGROUND

Plaintiffs allege in their Complaint that, on or about July 25, 2001, Lisa Harris Fisher sustained personal injuries when she slipped and fell in a bathtub in a Red Roof Inn motel owned and operated by Defendant. Charles Fisher, Lisa Harris Fisher's husband, alleges loss of consortium.

During a deposition on April 8, 2003, Lisa Harris Fisher testified that she had been residing with her husband at the time of the alleged accident, and that she continued to reside with him. She also testified that she was covered by her husband's health insurance plan. Lisa Harris Fisher further testified that she had completed an application for DPW benefits, and provided part of that application to defense counsel during her deposition.

Defendant has supplied the Court with a copy of Lisa Harris Fisher's October 22, 2002 DPW application for cash assistance, medical benefits, food stamps and emergency cash assistance, as well as the August 6, 2003 deposition transcripts of two DPW employees, Jeanne Gudnitz and Gail Elliot, who had contact with Ms. Fisher as her intake worker and career development counselor respectively.

Lisa Harris Fisher represented on her DPW application that she was separated from her husband, Charles Fisher, that his address was unknown to her, and that he was providing no support

to her. (Def.'s Ex. 1 at 510, 513.) At the end of the application, Lisa Harris Fisher's signature appears beneath the following statement: "I certify that, subject to penalties provided by law, the information I gave is true, correct, and complete to the best of my knowledge." (Def.'s Ex. 1 at 521.)

II. DISCUSSION

Plaintiffs object to the admission of any evidence relating to Lisa Harris Fisher's DPW application, including any testimony from the DPW employees, because, Plaintiffs allege, Lisa Harris Fisher has never been convicted a crime and Defendant seeks to impeach her credibility by offering evidence that is inconsistent with Rule 609.¹ In response, Defendant concedes that it intends to use the DPW application to impeach Lisa Harris Fisher's credibility, and clarifies the basis for propounding such

¹ Rule 609 provides, for the purpose of attacking the credibility of a witness:

- (1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and
- (2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.

Fed. R. Evid. 609(a).

evidence by enumerating the evidentiary rules relevant to this dispute, specifically, Rules 608(b) and 403. We agree that Rule 608(b), not Rule 609, provides the proper analytical framework for Plaintiffs' motion in limine, and review Plaintiffs' motion accordingly.

Federal Rule of Evidence 608(b) provides:

Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness

Fed. R. Evid. 608(b). Once the Court finds that the proffered evidence falls within the purview of Rule 608(b), such evidence must then be evaluated under Rule 403 to determine whether its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. United States v. Bocra, 623 F.2d 281, 288 (3d Cir. 1980).

In a case analogous to this one, the United States Court of Appeals for the Third Circuit held that use of a letter for impeachment on cross-examination does not violate Rule 608(b) where the witness does not deny having written the letter. Carter v. Hewitt, 617 F.2d 961 (3d Cir. 1980). In that case, Carter, a state prison inmate, had written a letter describing how to file a complaint charging prison guard brutality. Id. at 964. During Carter's testimony at his civil rights trial

alleging brutality by guards, the defendant confronted Carter with the letter on cross-examination. Id. On appeal, Carter claimed that use of the letter violated the limitations on impeachment set forth in Rule 608(b). Id. at 969.

The Third Circuit explained that "[t]he principal concern of the rule [608(b)] is to prohibit impeachment of a witness through extrinsic evidence of his bad acts when this evidence is to be introduced by calling other witnesses to testify." Id. The court determined that no violation of the rule occurred in that case, since Carter did not deny having written the letter, rather conceded authorship, but claimed that the letter was not an effort to encourage the filing of false complaints. Id. at 970. The court held that, particularly where credibility is the critical issue, "the extrinsic evidence ban should be relaxed when the witness sought to be impeached admits the impeaching act." Id. at 971 n.11.

Here, Lisa Harris Fisher's credibility is a critical issue in her personal injury claim since she is the only witness to her alleged accident at the Red Roof Inn. As a witness, one's character for truthfulness or untruthfulness is always at issue, particularly, where, as here, credibility is a critical issue. If, indeed, there were misrepresentations made by Lisa Harris Fisher on her DPW application they would certainly be matters probative of her character for truthfulness. There is no dispute here that Lisa Harris Fisher completed the DPW application and

signed it under penalty of law, thus, effectively, adopting the statements contained therein. That being the case, Rule 608(b)'s prohibition against introducing extrinsic evidence for the purpose of attacking or supporting a witness' character for veracity is inapplicable here. See Carter v. Hewitt, 617 F.2d at 964.

Upon balancing, it is apparent that Rule 403 does not help Plaintiffs. Rule 403 provides:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Fed. R. Evid. 403. The rule does not offer protection against evidence that is merely prejudicial, in the sense of being detrimental to a party's case; rather, the rule only protects against evidence that is unfairly prejudicial. Carter, 617 F.2d at 972. Evidence is unfairly prejudicial when it has "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." Advisory Committee's Note, Fed. R. Evid. 403.

There is no doubt that introduction of the DPW application will have a prejudicial effect on Plaintiffs' case. The jury may make an adverse inference about Lisa Harris Fisher's character for truthfulness, but that is precisely the reason for admissibility of such evidence. See Adelman v. GMAC Mortgage

Corp., No. Civ. A. 97-691, 1998 U.S. Dist. LEXIS 1211 at *4 n.2 (E.D. Pa. Feb. 5, 1998). Plaintiffs make no showing that introduction of the DPW application would present a danger of unfair prejudice, especially since Lisa Harris Fisher conceded to having completed the DPW application for benefits. Moreover, Plaintiffs' counsel will have an opportunity on redirect to rehabilitate Lisa Harris Fisher, if necessary, as to why such alleged misrepresentations were made on her DPW application. Since the parties do not dispute that Lisa Harris Fisher completed the application at issue in this motion, there will be no need to elicit any testimony from the two DPW employees, Jeanne Gudnitz and Gail Elliot concerning her application.

III. CONCLUSION

Accordingly, upon proper foundation, evidence relating to Plaintiff Lisa Harris Fisher's representations on her DPW application shall be permitted under Rule 608(b) as the parties do not dispute that she completed the application, and the probative value of admitting such evidence is not substantially outweighed by any danger of unfair prejudice. Therefore, testimony from the DPW employees relating to Lisa Harris Fisher's application will be unnecessary and shall not be introduced in evidence. For these foregoing reasons, Plaintiff's Motion in Limine is **GRANTED IN PART** and **DENIED IN PART**.

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O R D E R

AND NOW, this day of February, 2002, having considered Plaintiffs' Motion in Limine (Doc. No. 27) and Defendant's Response (Doc. No. 29) and supporting exhibits (Doc. No. 30) thereto, **IT IS ORDERED** that Plaintiffs' Motion in Limine is **GRANTED IN PART** and **DENIED IN PART**, insofar as:

1. Lisa Harris Fisher's representations on her DPW application, upon proper foundation, **SHALL** be admissible in evidence.
2. Testimony from DPW employees Jeanne Gudnitz and Gail Elliot **SHALL NOT** be introduced in evidence.

BY THE COURT:

JAMES MCGIRR KELLY, J.